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February 7, 2013

Via Email and Hand Delivery

The Honorable Paul G. Gardephe
United States District Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

USDC SDNY
DOCUMENT
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DATE FILED: 2/7/13

Re: United States v. Gilberto Valle, 12 CR 847

Dear Judge Gardephe:

As directed by the Court's order of February 5, 2013, enclosed please find defense counsel's declaration, made on notice to the government, in support of Mr. Valle's February 4, 2013 request that (1) the defense be permitted at trial to present via videoconferencing, the live testimony of Sergey Merenkov, a Russian national who resides in Moscow, and (2) the Court authorize the defense to depose Mr. Merenkov before trial pursuant to Fed. R. Crim. P. 15.

We ask that, before the Court rules on the issue, the witness's name not be included in any papers filed publicly on ECF so as to avoid pre-trial harassment of the witness. The defense is prepared to file the declaration with the witness's name redacted.

Respectfully submitted,

Julia L. Gatto
Julia L. Gatto
Assistant Federal Defender
(212) 417-8750

cc: AUSAs Hadassa Waxman/Randall Jackson (via email)

MEMO ENDORSED

*The Government will respond to this application
by 5:00 p.m. on February 8, 2013.
The application to file the declaration in redacted
form is denied.*

SO ORDERED:

Paul G. Gardephe
Paul G. Gardephe, U.S.D.J.

Dated: Feb. 7, 2013

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA :

12-cr-847 (PGG)

- V - :

GILBERTO VALLE :

**DECLARATION
ON NOTICE**

Defendant. :

-----X

Julia Gatto hereby declares under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am an attorney with the Federal Defenders of New York, Inc., and am counsel to Defendant Gilberto Valle. I submit this Declaration in support of Mr. Valle's request that: (1) the defense be permitted at trial to present via videoconferencing, the live testimony of Sergey Merenkov, a Russian national who resides in Moscow; and (2) the Court authorize the defense to depose Mr. Merenkov before trial pursuant to Fed. R. Crim. P. 15.
2. Mr. Merenkov is a critical witness for the defense and his testimony is essential to Mr. Valle's Sixth Amendment right to present his defense.
3. Mr. Merenkov is the founder and webmaster of darkfetishnet.com, the website at the core of Mr. Valle's case.
4. Mr. Valle was a member of darkfetishnet.com. Through that site, Mr. Valle interacted in cyberspace with many other members, including the three individuals the government has identified as Mr. Valle's alleged co-conspirators - Michael Van Hise, the user or users behind the email account alisherkhan79@gmail.com, and the user or users behind the email account meatmarketman@rocketmail.com.

5. Mr. Valle's relationship with Michael Van Hise, alisherkhan79@gmail.com, and meatmarketman@rocketmail.com existed only in cyberspace. He never met any of them in the real world. They each knew one another only by their screen names and email account addresses. Mr. Valle's screen name and email account address did not include any real personal identifying information about himself.
6. Nevertheless, Mr. Valle's internet communications with these email accounts, initiated through darkfetishnet.com, comprise the evidence of the purported "agreement" at the center of the government's conspiracy charge.
7. In his internet conversations, Mr. Valle transmitted photos of women, some of whom he knew, to the users of the email accounts. Mr. Valle and the users on the other end would then fantasize about performing disgusting acts of sadomasochism on the women depicted in the pictures. Mr. Valle denies that either he or the individuals with whom he chatted ever intended to act on their fantasies.
8. Although wildly unusual to anyone unfamiliar with darkfetishnet.com or the subculture in which it exists, Mr. Valle's relationship with these individuals (and the substance of their communications) appears typical of the interactions taking place on the internet through fetish fantasy websites like darkfetishnet.com.
9. Mr. Merenkov is expected to testify about darkfetishnet.com, generally, including why and how he started it, how it has grown since its creation, how it works, and how it is monitored.
10. Mr. Merenkov is expected to testify about the conventions amongst darkfetishnet.com's membership. For example, members often exchange private email addresses (as was done between Mr. Valle and his alleged co-conspirators) and, in the past, many members

have posted photographs of real women (as Mr. Valle did) to engage other members in conversations like the ones in which Mr. Valle participated.

11. Mr. Merenkov will testify about facts specific to Mr. Valle's membership on the website, the eventual termination of that membership, and any information the witness possesses about Mr. Valle's alleged co-conspirators.

12. In short, Mr. Merenkov will provide critical background and factual testimony.

Mr. Merenkov's Testimony

13. Mr. Merenkov will explain to the jury how darkfetishnet.com works. He will testify that he and his partners started the website to fill a void on the internet for people interested in exploring their sexual fetishes. He modeled the site on Facebook and designed it to be a place for people with fetishes to meet online and share their fantasies. He will testify about the popularity of his site and others like it and the records he keeps of his membership's demographics. Darkfetishnet.com currently has 37,561 members, about a quarter of which are women.

14. Mr. Merenkov will talk about the fetishes his members are exploring online. He ranks cannibalism as the second most popular subject matter (asphyxiation is the first).

15. Mr. Merenkov will testify about the terms of service for his membership, what measures are taken to monitor the site for content, and the circumstances under which an individual's membership can be terminated. Members are encouraged to speak to each other in whatever manner they want and to engage in as realistic sounding role-play as they want. Their messages are private and cannot be seen by the webmaster or any other administrator. Only if another member complains will a member be kicked off or warned about his or her communications. Otherwise, it is a space to be entirely free in one's

speech and thoughts. Mr. Merenkov will testify that no complaints were lodged against Mr. Valle.

16. Mr. Merenkov will explain that, despite the private messaging capabilities of darkfetishnet.com, most members who want to communicate with other members take their conversations off the website and to their private email accounts. Darkfetishnet.com is a very slow website and it is difficult, if not impossible, to communicate in real time. Members prefer to use instant messaging through their private email accounts to communicate.
17. Mr. Merenkov will explain that, in September of 2012, he and his partners added a new term of service for their membership banning the posting of "private photos of people taken from social media sites without [their] consent." <http://darkfetishnet.com>. He and his partners had noticed an increasing number of darkfetishnet.com members posting photographs of women which appeared to be from the women's Facebook pages. In mid-September 2012, Mr. Merenkov asked the membership to no longer engage in the practice. Mr. Merenkov estimates that hundreds of members were engaged in the practice before he instituted the new policy.

Mr. Merenkov's Testimony is Critical to the Defense

18. Mr. Merenkov's testimony is significant to the defense in several respects. First, he explains darkfetishnet.com. Mr. Merenkov will explain that darkfetishnet.com is a fantasy website designed so that people, like Mr. Valle and his alleged co-conspirators, who have sexual fetishes can safely and legally explore and discuss their interests with like-minded people. It is not a place designed for serial killers to meet and plot together. Indeed, tens of thousands of people are chatting in the manner that Mr. Valle was

chatting. Without Mr. Merenkov's testimony, the key internet chats will be presented to the jury entirely out of context.

19. Second, Mr. Merenkov counters important aspects of the government's case. AUSA Randall Jackson previously has argued that a serious intent can be inferred from the fact that a chat, initiated through darkfetishnet.com, is taken off the site to a private email account. Mr. Jackson has argued that individuals who are serious about their fantasies must go off of the site to avoid darkfetishnet's "monitoring."

...it became clear through the investigation that they were speaking specifically over Yahoo Messenger and not only over the Dark Fetish Network specifically to avoid some of the monitoring on the Dark Fetish Network which is purportedly designed to weed out people who are engaging in more serious real conduct, conversations that could be potentially about real things.

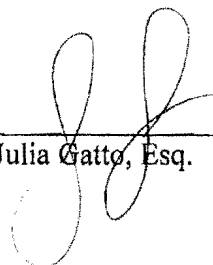
[T]here is we believe on the Dark Fetish Network some monitoring to see whether people are engaging in certain types of activities.

Tr. 1/7/13 Detention Hearing before Judge Pitman, 12mj011, p. 28-29.

20. This is not true. As Mr. Merenkov will testify, there is no monitoring of private messages between members on darkfetishnet.com. Nor do the administrators monitor the site's content to determine who, if anyone, is for real and who is fantasizing. The "game" of role-playing is designed to sound as real as possible. Members elect to exchange private email addresses and fantasize through that forum for a far less nefarious reason: It is faster and easier than communicating on darkfetishnet. The defense needs Mr. Merenkov to establish this critical fact for the jury and to effectively confront the government's claim that intent can be inferred from the forum in which the chats took place.

21. Similarly, the defense needs Mr. Merenkov to address another misguided assertion on the part of the government. Over the course of Mr. Valle's case, the government repeatedly has argued that Mr. Valle's use of photographs of real women indicates that he was "for real." However, again, that is simply not true. As Mr. Merenkov will testify, the practice of using real women's Facebook pictures in group chats on darkfetishnet.com was longstanding and prevalent enough that, in September 2012, darkfetish changed the terms of the site's service to preclude it. Hundreds of members were doing it. Without Mr. Merenkov's testimony, the government will be permitted to make the powerful-sounding (but completely unsupported) argument that Mr. Valle behaved in a manner very different from the way in which fantasists behave.
22. Even if the government does not make either argument above, Mr. Valle must be permitted to admit all evidence that corroborates that his online activity was consistent with fantasy role-play, especially on these critical issues related to where his conversations took place online and regarding the use of women's photographs.
23. Third, Mr. Merenkov will testify regarding important factual details as it relates to Mr. Valle's membership.
24. Based on the foregoing and for the reasons outlined in defendant's accompanying letter-brief, we ask that the Court grant the relief requested herein.

Dated: New York, New York
February 7, 2013



Julia Gatto, Esq.